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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HANDLE WITH CARE BEHAVIOR MANAGEMENT SYSTEM, INC.,

Petitioner,

- against -

NEW YORK STATE DIVISION FOR YOUTH, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF TO BRIEFS IN OPPOSITION

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REPLY TO THE BRIEFS IN OPPOSITION

Introduction

Petitioner Handle With Care Behavior Management System, Inc. ("HWC") submits this Reply to the Briefs in Opposition submitted by the State Defendants ("OCFS") and the Cornell Respondents ("Cornell").[1]

Respondents cherry-pick through the record, both factual and legal, and thus this Reply is necessary to correct their misstatements. In their collective 44 pages, Respondents also include no fewer than four "other reasons" for not granting the writ -- largely unrelated to the question HWC presents. In the space allotted, we endeavor to reply to all their points.[2]

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[1] For purposes of this Reply, "Cornell" shall also include Respondent The New York State College of Human Ecology ("CHE"), though it is a separate entity from Cornell.

[2] Citations used herein are as follows: HWC's Petition for Writ of Certiorari – "HWC-P"; Briefs in Opposition for OCFS and Cornell in this Court – "CBr __" and "NYBr __", respectively; OCFS's and Cornell's Second Circuit Briefs – "C2Br __" and "NY2Br __", respectively; HWC's Second Circuit Brief and Reply Brief – "HWC-2Br __"and "HWC-2R __"; "Joint Appendix" filed in the United States Court of Appeals for the Second Circuit – "JA __"; Complaint – "JA __ § __".

I. THE QUESTION PRESENTED DEALS WITH QUESTIONS OF LAW, ADEQUATELY PRESERVED BY THE ARGUMENTS BELOW, AND MERITS REVIEW BECAUSE OF ITS IMPORTANCE

Respondents err in contending that the question presented – whether HWC's allegations of actual anti-competitive effects made it unnecessary to plead a specific relevant market – was not preserved. Indeed, OCFS's argument during the motions to dismiss betray this assertion:

> Irrespective of the nature of the claim, *whether a per se violation or reasonable rule violation or quick look violation that requires more increased scrutiny*, ... the plaintiffs ... have failed to allege geographic market, [and] failed to allege product market .... (JA268)

In addition, in dismissing HWC's antitrust claims, the District Court ruled upon the precise issue of whether HWC was "free from the burden of engaging in market analysis to demonstrate the effect of defendant[sic] conduct on the market ...." (HWC-P 21a).

There is also no basis for the contention that HWC did not raise this matter before the Second Circuit prior to plaintiffs' petition for Rehearing *En Banc*, since HWC specifically argued:

> While these theories, or some of them, *might fall into a per se category, we* believe that for

> purposes of analyzing the anticompetitive nature of Defendants' conduct the market can properly *can be viewed to take account of the actual anticompetitive effect of the misconduct in the real-world economic circumstances*. (HWC-2Br, 36-37)

Thus, HWC made clear that a showing of "relevant market" should be dispensed with even in a "rule of reason" case.

Moreover, this Court has consistently held that a "purely legal question" may be "'appropriate for ... immediate resolution' notwithstanding that it was not addressed by the [lower] [c]ourt." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 743, n. 23, 102 S.Ct. 2690, 2698, n. 23 (1982)). Clearly, the question squarely presented by HWC -- whether well-pled allegations of actual anti-competitive effects make it unnecessary to also plead a specific relevant market -- is a "purely legal question" that this Court has it within its power to resolve.

Additionally, because the question HWC presents is in essence merely an alternative *argument* asserted in support of plaintiffs' §1 claim, there is no procedural bar to the grant of its petition. As this Court stated in *Lebron v. National R.R. Passenger Corp*, 513 U.S. 374, 379 115 S.Ct. 961, 965 (1995)("[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.")

The question HWC presents similarly does not raise any new statutes or claims, but simply advances an additional argument as to why its §1 claim should not have been dismissed at the pleading stage. *See also Yee v. Escondido,* 503 U.S. 519, 534, 112 S.Ct. 1522, 1532 (1992)(since petitioners "raised a taking claim in the state courts, therefore, [they] could have formulated any argument they liked in support of that claim here"). *Accord: PGA Tour, Inc. v. Martin,* 532 U.S. 661, 678, n. 27, 121 S.Ct.1879, 1891 n. 27 (2001) (where Americans with Disabilities Act coverage issue was raised below, Court would entertain new argument regarding statute's scope).

Even assuming *arguendo* that the question presented in plaintiffs' petition was not sufficiently raised or addressed in the lower courts, this Court has consistently held that such is not in itself a bar to hearing and resolving important questions of federal statutory law. The rule discouraging the deciding of quetsions not raised in the lower courts is "not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399 (1976). Moreover, when an issue is "important" and "recurring" (as surely the requirements of §1 claims are), this Court may "conclude that the interests of judicial administration will be served by addressing the issue on its merits." *Carlson v. Green,* 446 U.S. 14, 17 n.2, 100 S.Ct. 1468, 1471 n.2 (1980); *Accord: U. S. v. Mendenhall,* 446 U.S. 544, 552 n.5, 100 S.Ct. 1870, 1876 n.2 (1980)(where "question is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.")(quoting *Blonder-Tongue Laboratories v. University Foundation,* 402 U.S. 313, 320

n. 6, 91 S.Ct. 1434, 1438 n. 6 (citing *R. Stern & E. Gressman, Supreme Court Practices* 6.37 (4th ed. 1969)).

As HWC has presented to this Court a fundamental and recurring question of antitrust law about which there is an inter-Circuit split (See HWC-P, 19-27), there are compelling reasons to grant the writ under the standards discussed above. Moreover, the "question" is so inextricably intertwined with the "per se" issues fully argued in both the District and Circuit Courts as to dispel any concern that the Record is not fully developed to permit an adjudication of the question presented.

II. THERE IS A DEFINITE SPLIT AMONG THE CIRCUITS ON WHETHER A PLAINTIFF MAY STATE A VIOLATION OF §1 BY ALLEGING ACTUAL ANTI-COMPETITIVE EFFECTS, IRRESPECTIVE OF THE RELEVANT MARKET DEFINITION.

OCFS and Cornell blithely assert that there is no genuine split among the Circuits in applying *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2019 (1986) and its progeny, but that argument simply overlooks clear holdings to the contrary.

Perhaps most significant is *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 737 (7th Cir. 2004), where the Seventh Circuit, in a marked departure from the majority of other Circuits, expressed the view that *Indiana* does *not* allow a plaintiff to

"dispense entirely with market definition," but "[r]ather ... stand[s] for the proposition that if a plaintiff can show the *rough contours of a relevant market, and show that the defendant commands a substantial share of the market*, then direct evidence of anticompetitive effects can establish the defendant's market power - in lieu of the usual showing of a precisely defined relevant market and a monopoly market share." (Emphasis added).

In particular, *Republic Tobacco's* requirement that a plaintiff must show that "defendant commands a substantial share of the market" essentially eviscerates the holding in *Indiana* concerning "anti-competitive effects." This position was more recently followed in *In re Compensation of Managerial, Professional and Technical Employees*, 2008 WL 3887619 at *7 (D.N.J. August 20, 2008)("according to [*Republic Tobacco*], the direct evidence method does not 'allow an antitrust plaintiff to dispense entirely with market definition'").

Moreover, the Sixth Circuit, in *Worldwide Basketball & Sport Tours v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 960-61 (6th Cir. 2004), *cert. denied*, 126 S.Ct.334 (2005), also took an unduly narrow view of *Indiana* in holding that proof of actual anti-competitive effects did not necessarily obviate the eventual need for a formal market analysis under the rule of reason, but instead was merely a restatement of "the abbreviated or quick-look analysis"):

> this abbreviated or "quick-look" analysis may only be done where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit

> the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.

Id. at *961.*

To further illustrate the split among Circuits, the Second Circuit, in *Todd v. Exxon Corp,* 275 F.3d 191, 207 (2d Cir. 2001), Justice, then Circuit Judge Sotomayor expressly disavowed the very approach that the Sixth Circuit subsequently embraced in *Worldwide Basketball*:

> The use of anticompetitive effects to demonstrate market power, however, is not limited to "quick look" or "truncated" rule of reason cases. This Court's precedents discussed above were not "quick look" cases; they merely accepted alternative ways of demonstrating market power. *See K.M.B. Warehouse,* 61 F.3d at 127 (applying rule of reason); *Capital Imaging,* 996 F.2d at 545-46 (applying rule of reason)

This split among the Circuits, as well as uncertainty on the issue generally throughout the federal courts, is good reason for review of the question presented, particularly given the important role §1 plays in our national economic fabric.

III. THE §1 MISCONDUCT INVOLVED COLLECTIVE ACTION BY BOTH OCFS AND CORNELL – NOT AN EXCLUSIVE DEALING CONTRACT BETWEEN THEM

The Antitrust Misconduct by OCFS and Cornell Effectuated a Horizontal Exclusion by the PFAs of All Restraint Trainers Except Cornell

OCFS contends that, despite HWC's argument that "elaborate market analysis was unnecessary to its §1 claim," it would still have been dismissed because HWC does not allege any "horizontal restraint." NYBr 9-10. Likewise, OCFS argues that HWC "essentially" alleges that OCFS has an "exclusive dealing relationship with Cornell" to provide training to all the Private Foster Agencies ("PFAs") in New York. *Id.* Neither assertion is accurate.

There can be no doubt that *collective* conduct by Cornell *and* OCFS in violation of §1 is amply set forth in the complaint and related documents considered during the motions to dismiss. HWC's complaint alleges that OCFS, with the "participation" of Cornell, has "systematically refus[ed]" to allow the PFAs to select their own restraint training vendors, giving Cornell and OCFS a "monopoly situation within the State of New York, by disallowing PFAs the freedom to contract with HWC or any other vendor of restraint training (JA, 31,39-40)(¶¶ 34, 36, 38 86, 88-90).

OCFS has even used the threat of adverse regulatory and licensing actions to compel all PFAs to use

only Cornell's TCI program (JA, 39-40 ¶¶ 88-89), and, accordingly, to engage in a refusal to deal with HWC or other vendors of restraint training (JA, 40 ¶¶ 70-74, 90). As a result, PFAs expressing an interest in using HWC's (and others') programs were coerced by OCFS into *not* using HWC (JA, 37, ¶¶ 71-73). OCFS also indicated directly *to HWC* that OCFS would *simply not permit* HWC (or any vendor other than Cornell) to provide restraint training to the PFAs (JA, 37,39-40¶¶ 73, 88, 89). The complaint further alleges that PFAs "*can only use TCI as their use of force training provider or risk their license and ability to do business within the State of New York*" (JA39-40 ¶ 88; emphasis added). Further details of this coercive conduct are described in, plaintiff's 2d Circuit brief (HWC-2Br, 10-15).

Moreover, there can be no better demonstration of Cornell's participation in this misconduct than Cornell's signature on the Memoradum of Agreement ("MOA") submitted by Respondents in connection with their motions to dismiss (JA 141-54). The most explicit goal in the MOA, leaving aside the ambiguous language to pursue "general life improvement needs," is to help *maximize* federal funding (JA-141; JA-40, ¶ 91). Cornell participated in that maximization by charging – and OCFS by paying – excessive, anticompetitive prices for training the PFAs, all while jointly acting to exclude any other vendors from servicing the PFAs (HWC-2R, 7-8). This was no arms-length exclusive dealership, but a concerted effort by Respondents.

This Court would have little difficulty characterizing as a violation of §1 a situation where collective action were taken by all 160 PFAs in New York,

as a *state-wide horizontal array of buyers,* to exclude all but TCI as their trainer. Such conduct would violate §1, and would likely even do so irrespective of any relevant market. The consumers of the services of the PFAs including the governmental entities that fund them, would be injured by any pricing mischief that resulted. Here, however, the boycott of HWC and other vendors of restraint training was accomplished not by an agreement *among* the PFAs, but rather was imposed *on them* by OCFS, acting with Cornell.[3] This would constitute a violation of §1 *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 231(2d Cir. 2004).

The PFAs Are Injured Consumers – *Not* OCFS

Respondents' efforts to characterize OCFS as the only entity involved in paying for Cornell's training is also in error.

The 160 PFAs are private, autonomous, not-for-profit, corporations operating foster care homes, run by their boards and chief executive officers, with only regulatory oversight by OCFS. *See* (HWC-2Br, 10-12). OCFS's own regulations mandate that a PFA's CEO (*not* OCFS) "direct . . . all aspects of a[] [PFA's] program," including "staff development and training." *Id.*

The PFAs receive partial reimbursement by the county governments and also by OCFS. One type of PFA expense eligible for reimbursement is "staff

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[3] HWC made this argument in its Second Circuit submissions, but Respondents simply did not answer the point. *See* HWC-2R 44

development," which includes "training." 18 NYCRR §427.3; OCFS, *Standards of Payment for Foster Care of Children Program Manual*, § C-28 (August, 2006). Notably, only "reasonable" costs for hiring outside training services are allowable. *Id.* §C-23. Such costs (both prospectively and for past fiscal years) are reported to OCFS by the PFAs under the category of "administration," for which they are reimbursed. *Id.* § B-1; 18 NYCRR §§427.1, 427.5. N.Y. Social Services Law § 398-a. *See also* N.Y. Social Services Law §153-k. The fact that OCFS may advance the maximum state reimbursable amount to the PFAs does not, therefore, mean that the training is *free* to the PFAs, which must fund at least 35% of their costs through other means *Id.* NY Social Services Law §153-k. Moreover, even absent demonstrable *economic* harm to the PFAs, they have been harmed by virtue of the subversion of their *choice* of a restraint trainer, and restriction of quality competition is another type of anti-competitive behavior condemned by the antitrust laws.

Hence, Respondents have interfered with the PFAs, as consumers of restraint training services. Likewise, HWC and other vendors of restraint training have suffered antitrust injury by their exclusion from offering their services to the PFAs.

IV. RESPONDENTS' INVOCATION OF "STATE ACTION IMMUNITY" UNDER PARKER-MIDCAL IS FLAWED

This issue was never decided by the District Court nor the Second Circuit. Respondents' renewal of this purported affirmative "defense," on which they have the burden of proof, will not help them here.

The actions of OCFS, which are *contrary* to its own regulations investing PFAs with substantial autonomy, can not be considered the acts of the State itself. Moreover, contrary to Respondents' assertion, there was no "clearly articulated" state policy to supplant competition. Nor was the coercive conduct by OCFS and Cornell a "foreseeable result" of the general authority delegated to it by the statutes cited.

In short, our national policy in favor of competition "cannot be thwarted by casting such a gauzy cloak of state involvement . . .." (HWC-2R, 22). For the reasons stated above, as well as in HWC's Reply Brief in the Second Circuit (HWC-2R, 11-26), this defense should be rejected.

CONCLUSION

The Petition should be granted, the Decision of the United States Court of Appeals reversed and its Judgment vacated, and the case remanded for further proceedings.

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